No. 89-345

(2)

In The

Supreme Court of the United States

October Term, 1989

JULIANNA KAMECKI, Individually and as Personal Representative of the Estate of MARIA KAMECKI, Deceased,

Petitioner,

v.

NICOLA A. SMILEVSKY, M.D., P.C.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent Nicola A. Smilevsky, M.D. respectfully asks that the Petition for a Writ of Certiorari sought by petitioner to review the judgment of the District of Columbia Court of Appeals entered on May 31, 1989 be denied.

COUNTERSTATEMENT OF THE CASE

In this action Petitioner, Julianna Kamecki, proceeding both individually and on behalf of the estate of her

deceased mother, Maria Kamecki, seeks damages for wrongful death allegedly caused by the neglect of Respondent, Nicola Smilevsky, M.D., who was her mother's treating physician for a brief period prior to her death at the age of 84.[1] Originally proceeding *pro se*, Petitioner commenced the action by filing a pleading styled "Complaint For Damages From Medical Malpractice" on April 27, 1985. In that Complaint, which was approximately twenty-seven (27) pages in length, Petitioner apparently alleged that her mother's death was caused by the unspecified medical negligence of Dr. Smilevsky.[2] Subsequent discovery and other pre-trial proceedings eventually revealed that Ms. Kamecki was alleging that her mother's death was caused by the negligent withdrawal of the mother's anti-stroke medication, a drug known as Persantine. (App. G, 14a-16a).

After certain preliminary motions by Respondent were addressed and ruled upon, Respondent filed his Answer to the Complaint on or about June 28, 1985, and shortly thereafter propounded certain written discovery requests to the Petitioner. For almost a year thereafter, Petitioner, who was still acting *pro se*, ignored the pending discovery requests and did nothing to prosecute her

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[1] Respondent submits the following additions and clarifications necessary to correct the Statement Of The Case proffered by Petitioner. References herein to the Appendices to the Petition for Writ of Certiorari are cited "App." References to the Supplemental Appendix to this Brief In Opposition To Petition for Writ of Certiorari are cited "Supp. App."

[2] Who was the sole defendant in the Superior Court.

case. Finally, in response to efforts by Respondent to compel responses to the pending discovery, Petitioner retained counsel who entered his appearance on or about June 18, 1986. In due course, at the request of Respondent, the case was assigned to the Civil I Branch of the Civil Division of the Superior Court[3] where it was assigned to the calendar then supervised by Associate Judge Peter Wolf.

Thereafter, in accordance with his custom and as allowed by the court rules, Judge Wolf held a Status Conference on January 9, 1987, and following that conference entered a Scheduling Order pursuant to which Petitioner was required to file a "Rule 26(b)(4) Statement[4]" setting forth the identity, qualification of and opinions of all of her expert witnesses on or before April 6, 1987. On April 3, 1987, Petitioner requested and received an extension of the deadline for filing her 26(b)(4) statement upon her representation that her search for an expert had been fruitless. By Order dated April 8, 1987, Judge Wolf directed Petitioner to submit her Rule 26(b)(4) Statement by April 27, 1987. (Supp. App. A, 1a.) On April 27, 1987, Petitioner filed the required statement designating one Maureen N. Minor, M.D., as her sole expert and indicating that Dr. Minor, another of her mother's physicians,

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[3] *See*, Superior Court Civil Rule 40-II for an explanation of the Civil I Branch and its function.

[4] The reference is to Superior Court Civil Rule 26(b)(4) which is identical to Fed. R. Civ. Proc. 26(b)(4). (*See* App. I, 20a - 21a).

would testify as to certain matters which did not seem to deal with the medical issues in the action. (App. D, 8a-9a).

In due course the deposition of Petitioner's expert was noted and taken by counsel for Respondent. Although he had been notified of and agreed to the deposition date, Petitioner's counsel failed either to attend or request a postponement of Dr. Minor's deposition which, accordingly, proceeded as scheduled on June 30, 1987.

At her deposition, Dr. Minor stated that she had not been requested to serve as an expert witness either by Petitioner or by Petitioner's attorney. She also testified, unequivocally, that she had not agreed to serve as an expert witness in the lawsuit and that, in any event, she simply had no opinions regarding whether Respondent had violated the standard of care in connection with his treatment of Petitioner's mother.

Thereafter Respondent timely filed a Motion For Summary Judgment alleging that expert testimony was required to prove the essential medical elements of Petitioner's case and that without such an expert there was no reason for a trial inasmuch as Petitioner could not prove either a breach of the relevant standard of care by the Respondent or that such a breach, if any, had proximately caused her mother's demise. *See*, Respondent's Statement of Material Facts Not in Dispute, (Supp. App. B, 2a-3a).

Petitioner failed to respond to Respondent's Motion For Summary Judgment within the allotted time and, on August 24, 1987, Judge Wolf granted the unopposed

Motion and entered judgment in Respondent's favor. (App. B, 4a-5a).

Petitioner duly requested reconsideration of the ruling and, after oral argument on Petitioner's Motion For Reconsideration, Judge Wolf reaffirmed his prior entry of Summary Judgment in Respondent's behalf and dismissed the case. (App. C, 6a-7a). At oral argument upon Petitioner's Motion For Reconsideration Judge Wolf found, contrary to Petitioner's position, that the complexity of the case required Petitioner to establish the essential elements of negligence through expert medical testimony, which she lacked, and that there was therefore no basis for allowing her to proceed to trial.[5]

Petitioner then appealed the ruling to the District Of Columbia Court Of Appeals. On appeal Petitioner alleged that Summary Judgment was inappropriate because the testimony of Dr. Minor provided a sufficient basis for a jury to find negligence on the part of Respondent and that summary judgment was premature, inasmuch as Petitioner had not yet completed her own discovery.[6] The Court Of Appeals affirmed by an unsigned *per curiam*

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[5] Petitioner's position was apparently that (1) no expert testimony was required and (2) that summary judgment was inappropriate, in any event, because Petitioner had not yet completed her own discovery by deposing Dr. Smilevsky. Judge Wolf apparently found the latter argument unconvincing for several reasons, not the least of which being that Petitioner *had never requested a deposition of Dr. Smilevsky.*

[6] *See,* Footnote 5. It should also be pointed out that, although Petitioner's counsel had entered an appearance over fourteen (14) months prior to Judge Wolf's final ruling, Petitioner never propounded any discovery requests to Respondent.

opinion, holding that expert testimony was required and that summary judgment was appropriate in the absence of any such testimony.

At no time while the case was pending in either the Superior Court Of The District Of Columbia or the District Of Columbia Court Of Appeals has Petitioner ever raised any constitutional question or other federal issue warranting review by this Court.

REASONS FOR DISMISSING OR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because there was no federal question raised in the courts below and there is no constitutional or federal question raised in the petition itself.

The Petition should also be denied because the Superior Court of the District of Columbia did not commit error in granting Respondent's Motion for Summary Judgment. Substantial and adequate District of Columbia case law supports the District of Columbia Court of Appeal's affirmance of the trial court's action.

II. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THIS CASE.

The Supreme Court derives its authority to review final judgments of the highest state courts by Writ Of

Certiorari pursuant to 28 U.S.C. Section 1257.[7] Under 28 U.S.C. Section 1257, generally, jurisdiction is present only if the validity of a statute or treaty of the United States is in question or if the validity of a state statute is in question on the grounds that it is repugnant to the Constitution or laws of the United States. Additionally, the jurisdiction of the Court may be invoked pursuant to 28 U.S.C. Section 1257 "when any title, right, privilege or immunity is especially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States."

The Supreme Court will review a final decree of the highest state court when there is a substantial federal question involved. *See, e.g., Henry v. Mississippi*, 379 U.S. 443 (1965); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). *See also, Reich v. Freeport*, 388 F. Supp. 953 (1974); *Pelliccioni v. Schuyler Packing Co.*, 356 A. 2d 4 (N.J. 1976). The Supreme Court of the United States will not reexamine the final judgments of a state court unless the federal issues were presented to the state court in the first instance and the state court was timely apprised of the nature or substance of those federal claims. *Illinois v. Gates*, 462 U.S. 213 (1983); *Webb v. Webb*, 451 U.S. 493 (1981).

In this case, the trial court, relying upon the local case law of the District Of Columbia, ruled that expert

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[7] In this case, Petitioner claims that this Court has jurisdiction under 28 U.S.C. Sections 1254 and 1257. Section 1254 deals with jurisdiction of this Court over other federal courts. In this case, jurisdiction may not be invoked under Section 1254.

testimony was unquestionably necessary to prove a violation of the standard of care and causation. *Ebil v. Kogen*, 494 A.2d 640 (D.C. 1985). In view of Petitioner's unwillingness or inability to name an expert willing or able to testify as to those matters within the time allotted by the trial court's Scheduling Order, and as provided by Superior Court Civil Rule 26(b)(4), Judge Wolf appropriately granted summary judgment pursuant to Superior Court Civil Rule 56.[8] The inability or unwillingness of Petitioner to name an appropriate expert was clearly the basis of the rulings in the trial court and was unquestionably the sole basis by which the Court Of Appeals affirmed. Accordingly, there is and was simply no federal question involved in this case. Petitioner does not attack the validity of any statute, state or federal, and Petitioner has never claimed a right under the Constitution or any law of the United States.

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[8] At oral argument in the trial court on Petitioner's Motion for Reconsideration of Order Granting Defendant's Motion for Summary Judgment, Judge Wolf mentioned that the holding in *Ebil v. Kogen* was consistent with two Supreme Court cases: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Petitioner may not invoke jurisdiction of this Court merely because the trial court chose to refer to federal cases for interpretation. *See, Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61 (D.C. 1980)(the District of Columbia Court of Appeals is not bound in its interpretation of the Superior Court rules by a federal court's interpretation of the same federal rule).

III. ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Supreme Court of the United States will not review a decision of a state court which rests upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226, 237 (1963). If adequate and independent state grounds exist, the Supreme Court will not take jurisdiction even if there is a federal issue. *Bacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

In her Petition Petitioner argues, for the first time, that this case presents a unique opportunity for the Supreme Court to clarify standards for a state court's treatment of summary judgment motions. Petitioner argues that it was error for Judge Wolf to grant summary judgment in this case because Petitioner had not had an adequate opportunity for discovery. The real issue is whether the trial court abused its discretion in granting summary judgment when, after fourteen (14) months, the Petitioner had not instituted any attempts to obtain discovery from defendant; had not obeyed the trial court's Scheduling Order with regard to the designation of the required experts; and, at least initially, had not even bothered to respond to the Motion For Summary Judgment when it was filed.

Indeed, the very words of the Petitioner's own so-called "Complaint For Damages From Medical Malpractice," as well as her responses to Respondent's extensive discovery requests; and, finally, her own Rule 26(b)(4)

Statement, are highly significant in illuminating the burden of proof that she had to meet. This discovery clearly indicated that Petitioner's claims involved treatment that required knowledge solely within the competence of the medical profession. Therefore, summary judgment was properly granted in this medical malpractice action where Petitioner could not or would not produce a medically qualified expert when the testimony of such an expert was required by the complexity of the case.

In the District of Columbia, the plaintiff must bear the burden of introducing proof sufficient to establish a *prima facie* case of medical malpractice. Such a *prima facie* case

> . . . must normally consist of evidence which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of.

Ebil v. Kogan, supra, 494 A.2d at 640; *See also Morrison v. MacNamara,* 407 A.2d 555 (D.C. 1979). The standard of care has generally been defined as that degree of skill or care a reasonably prudent person would have exercised under the same or similar circumstances. "Beyond this, the law requires that those engaging in activities requiring unique knowledge and ability to give a performance commensurate with the undertaking." *Washington Hospital Center v. Butler,* 384 F.2d 331, 335 (D.C. Cir. 1967). A defendant's specific conduct is then evaluated against the appropriate standard to determine if his conduct is reasonable under the circumstances. For lay jurors,

unlearned and inexperienced in the area of medical science and the accompanying array of sophisticated terms and concepts,

> . . . there must, when the special tests are applied, be an explanation in order that they may intelligently determine what the criterion is and whether the defendant's conduct meets it.

Id., 384 F.2d at 335.

Summary judgment is especially appropriate here for it is a mechanism to promptly dispose of actions in which there is no genuine issue of material fact and, in doing so, avoids the time, expense and burden of a useless trial.

By disposing of actions in which there is no genuine issue of material fact, summary judgment

> . . . avoids the needless expenditure, both by the courts and by the parties of valuable resources in unnecessary trials, and mitigates the potential for misuse of the legal process by a party to harass adverse parties or to coerce them into settlement.

Nader v. de Toledano, 408 A.2d 31, 42-43 (D.C. 1979); *cert. denied*, 444 U.S. 1078 (1980).

Petitioner is mistaken in her reliance upon *Abbey v. Jackson*, 483 A.2d 330 (D.C. 1985), to support her theory that Judge Wolf erred when he ruled that expert testimony was needed in this medical malpractice action. In making such an assertion Petitioner has failed to analyze the two-part character of *Abbey v. Jackson* appropriately. The facts of *Abbey v. Jackson*, an informed consent case, involve a plaintiff who alleged that she did not receive information necessary to make an informed decision as to whether or not to undergo an abortion. *Abbey v. Jackson*

did not deal with the nature of the risks involved but rather was confined to the single issue of whether plaintiff was *informed* of those risks:

> To meet the expert testimony requirement . . . Abbey must establish through expert testimony, the presence and types of risks associated with abortions. The parties in this case however, do not dispute the existence and nature of risks in an abortion; whereas Abbey alleges she received no information. Thus the cogent question in this case is one of credibility, traditionally the province of the jury, and the need for and role of expert testimony extremely limited.

Abbey v. Jackson, supra, 483 A.2d at 334.

The crucial difference between *Abbey v. Jackson* and this case is that in *Abbey v. Jackson* the complex medical issues, " . . . the presence and type of risks associated with abortions . . . " were not dispositive of the case. Rather, *Abbey v. Jackson* turned on the credibility of defendants and plaintiff, not whether plaintiff was informed of those risks.

In this case, Petitioner argued that the alleged medication change somehow "caused" her mother's stroke. The dispute here centered on the cause of strokes and their prevention. The issue of credibility in *Abbey v. Jackson* was within the traditional province of the jury, but the medical issue, the cause and prevention of strokes, is not within the ken of the average juror. It is precisely for this reason that Petitioner is required to present testimony by a medical expert.

Petitioner's inability to withstand summary judgment was *not* due to lack of sufficient time to gather

information to oppose summary judgment, as contemplated by Rule 56(f). Counsel thought that he had an expert and never asked for time to gather affidavits or to engage in additional discovery. The problem with Petitioner's argument of lack of time is that Petitioner cannot demonstrate that she was not accorded ample time either to conduct her discovery *or* to respond to the Defendant's Motion For Summary Judgment. She requested, and was granted an extension of time to file her Rule 26(b)(4) Statement. Petitioner had exactly two years from the date suit was filed within which to produce expert testimony. The need for the extension may have come about because of difficulty or inability to locate an expert willing to testify against Dr. Smilevsky. But whatever the cause, by naming Dr. Maureen Minor as an expert, Petitioner demonstrated that she was ready to proceed. As it turned out, Petitioner's desire to proceed amounted only to a vague hope that Dr. Minor's testimony would be favorable to her at some point, without any reasonable inquiries as to whether Dr. Minor would testify and if so, what the subject matter of her testimony would be.

Petitioner refused to accept the fact that once having charged Defendant with negligence, the burden of proof was on her to come forward with expert testimony on the appropriate standard of care and show any breach thereof. However, without expert testimony, Petitioner failed to show she could provide a jury a knowledgeable explanation of the unfamiliar medical terms and concepts involved in a discussion of transient ischemic attack (TIA) and stroke, its cause and prevention, and the claimed benefits of dipyridamole (Persantine), all of

which was necessary for the jury to determine intelligently what the relevant standard of care was, and whether or not respondent's actions fell below that standard. *Washington Hospital Center v. Butler*, 384 F.2d 331, 335 (D.C. Cir. 1967). Defendant's conduct is not actionable unless his performance falls below the appropriate standard of care.

When a Rule 56(e) motion for summary judgment is made and supported an adverse party

> . . . may not rest upon the mere allegations in his pleadings, . . . his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not [so] respond, summary judgment if appropriate, shall be entered against him.

Stevens v. Airline Pilots Assn., 413 A.2d 1305, 1308-09 (D.C. 1980), *cert. denied*, 449 U.S. 1111 (1981). If the movant, in this case Dr. Smilevsky, makes a *prima facie* showing of his entitlement to summary judgment, that motion must be granted " . . . unless the opposing party offers competent evidence admissable at trial showing that there is a material issue of fact in dispute." *Nader v. de Toledano, supra*, 408 A.2d at 43. Simple reiteration that Plaintiff's counsel "expects" his expert to testify is simply not enough to postpone summary judgment.

Summary judgment cannot be further delayed because of a "vague hope" or "mere speculation" that other evidence may turn up to substantiate the bare allegations of the pleadings. *See, e.g., E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 205 (D.C. Cir. 1974). Failing the submission by the opposing party of "specific" and "concrete" facts revealing the existence of a genuine issue

at trial, summary judgment must be granted. *Stevens v. Barnard*, 512 F.2d 876, 878 (10th Cir. 1975); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 266-267 (1976).

CONCLUSION

The Petition For A Writ Of Certiorari should be denied because there is no federal question raised therein.

The Petition should also be denied because the action of the District Of Columbia Court Of Appeals affirming the judgment of the Superior Court Of The District Of Columbia was entirely proper. The Superior Court committed no error in granting Respondent's Motion For Summary Judgment. Substantial District of Columbia case law supports the proposition that the granting of a motion for summary judgment in this case was proper under the law of the District of Columbia.

Finally, Respondent has been forced to defend this totally non-meritorious claim for over four (4) years while Plaintiff has failed or refused to produce expert testimony establishing any breach of duty. Dr. Smilevsky should no longer be forced to bear the outrageous burden of defending Petitioner's unfounded attempts to keep this matter alive.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARIA KAMECKI, Estate,)
and)
JULIANNA KAMECKI,)
Plaintiff)
v.)
NICOLA A. SMILEVSKY, M.D.,)
Defendant.)

ORDER

UPON DUE CONSIDERATION of the Motion for Enlargement of Time filed herein on behalf of plaintiff Julianna Kamecki, and of the Memorandum of Points and Authorities filed in support thereof, and of the [lack of] Opposition thereto, it is, by the Court, this 8th day of April, 1987,

ORDERED, that said Motion be, and the same hereby is, GRANTED, and that the time for submission of plaintiff's Rule 26(b)(4) motion be, and the same hereby is, extended to April, 1987.

Peter H. Wolf
Judge

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SUPPLEMENTAL APPENDIX B

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARIA KAMECKI, Estate,)
and)
JULIANNA KAMECKI,)
Plaintiff)
v.)
NICOLA A. SMILEVSKY, M.D.,)
Defendant.)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The standard of care which gives rise to the plaintiff's Complaint involves issues of a complicated medical nature. The ability to present evidence concerning this standard of care is within the exclusive competency of the medical profession. (Complaint, paragraphs 25, 27 and 28; plaintiff's Answers To Interrogatories Nos., 13, 14, 15, 19, 21 and 34).

2. The only medical expert designated by the plaintiff was Maureen N. Minor, M.D. Dr. Minor stated that she had not been contacted by the plaintiff or her attorney, that she had not agreed to serve as an expert witness in this lawsuit and that she had no opinion on the standard of care involved. (Plaintiff's 26(b)(4) statement filed April 27, 1987; Deposition of Maureen N. Minor, M.D. pp 6-7, the record herein).

3. The deadline for plaintiff to submit a 26(b)(4) expert expired April 27, 1987. (Order of Judge Wolf dated April 8, 1987, the record herein).

Respectfully submitted,

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/s/ _____

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